In the

[illegible] Court of the United States

October Term, 1962

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.,

Appellees

On Appeal From the United States District Court for the Eastern District of Louisiana, New Orleans Division

APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

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OCTOBER TERM, 1967.

No. 925.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM.

REPLY TO THE MOTION OF SOUTHERN RAILROADS, APPELLEES.

At the outset, the action of the court below should be placed in its proper perspective. As pointed out in Appellants' Jurisdictional Statement, to develop the relative service costs of their respective territories in handling this traffic, both sides utilized the territorial Rail Form A costs. The Southern lines then modified those costs to include 12 adjustments. The Commission accepted five of those adjustments and rejected the others. It made a definitive analysis of each adjustment and it concluded that the

Form A average costs with the adjustments accepted reliably reflected the costs of the North-South traffic. The District Court reversed the Commission, disagreeing with that body's findings concerning the weight and significance to be accorded the cost evidence.

The District Court's action is in the teeth of this Court's recent decision in *Chicago & N. W. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 326, 87 S. Ct. 1585 (1967) where, in discussing a similar attack on the cost issues the Court said:

> "The presentation and discussion of evidence on cost issues constituted a dominant part of the lengthy administrative hearings, and the issues were thoroughly explored and contested before the Commission. Its factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry. Our previous description of the Commission's disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment. Baltimore & O. R. Co. v. United States, 298 U.S. 349, 359; New York v. United States, 331 U.S. 284, 328, 335, 349."

The above language is entirely apposite here. So is the holding in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349 (1936) that "The Commission alone is authorized to decide upon weight of evidence or significance of facts" (p. 359).

Contrary to the contentions of the Appellees, the decision below rests upon grounds which if accepted are, to use Appellees' own words, "far-reaching and ominous" (Motion, p. 6). This affirmatively appears both from the opinion of the court below and from the arguments with which Appellees attempt to justify it.

In a decisive passage in its opinion, on which Appellees heavily rely, the court below held that territorial average costs "cannot appropriately be accepted without further evidence for mechanical application to particular segments of traffic in a divisions case." (J.S. 24a). As we shall show below, the Commission's order does not rest upon any "mechanical application" of Form A costs and its reliance upon those costs as to the particular segment of traffic involved was supported by substantial evidence. It is clear that the District Court weighed the evidence *de novo* and substituted its own inferences or conclusions for those drawn by the Commission. If its decision is allowed to stand it will serve as a precedent for continued interference with the Commission's determination of cost accounting problems.[1]

I. The Southern lines say that Appellants seek to use "unadjusted territorial average costs" (Motion, 5) without any evidence that they measure the cost of controverted elements of the North-South traffic, and they quote from the opinion below that territorial average costs cannot be

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1. After stating that this case has been remanded to the Commission for further proceedings consistent with the requirements of the Administrative Procedure Act, Southern railroads say on page 23 of their motion: "The United States, which is charged by statute with the responsibility for defending orders of the Commission, has not appealed this disposition of the case." At page 5, Southern roads again bring this matter to the attention of the Court. In the court below the United States urged that the order of the Commission should be sustained. Lest the Court be misled into believing that the United States has changed its position and now agrees with the decision below, Appellants desire to state that they have been informed by the Attorney General that the reason that the Department of Justice did not file a Jurisdictional Statement was that it could make no special contribution to the defense of the order involved and that the order could be adequately defended by counsel for the Interstate Commerce Commission.

accepted "without further evidence for mechanical application to particular segments of traffic" (Motion, 8).

The fact that the Commission adopted five of the adjustments tendered by Southern lines, and the exhaustive analysis of these and the remaining controverted adjustments (taking up 26 pages of an appendix to its report) indicate how far removed its action was from a "mechanical application" of the Form A territorial costs.

There is abundant evidence to support the use of the Form A costs as adjusted by the Commission. At the outset, the order of investigation itself involved all traffic (except, by common consent, coal and coke) between all stations in the whole of Official Territory and all stations in the whole of Southern Territory and over all the railroads of each territory. It was truly a case involving territory-wide traffic between the North and the South. The record showed the North-South traffic of Northern and Southern lines combined to constitute 10% of their combined traffic (V.S. 36, Ex. 5). This contrasted with much smaller portions of total traffic in other cases in which the use of territorial averages had been approved, such as *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945), affirmed, *New York v. United States,* 331 U.S. 284 (1947), wherein the traffic moving under the rates involved constituted only 4.1% of the total traffic of the railroads (262 I.C.C. at 479).[2]

The record also establishes that the interterritorial traffic involved is an inseparable part of the whole and possesses no transportation characteristics which are distinguishable from those of traffic generally, and that the method of railroad operation is such that the use of average

2. Appellees seek to escape the force of this comparison by suggesting that the Commission was concerned in the *Class Rate* case with finding territorial average costs of all traffic. As this Court pointed out, however, the orders involved "affect class rates and class rates alone" and that ". . . this proceeding pertains only to class rates, which move but a small percentage of the traffic"; 331 U.S. at 330 and 343.

territorial costs was appropriate to the traffic involved in this case (V.S. 8).[3] This evidence showed, *inter alia*, that in a test week North-South traffic moved in 45% of all the trains operated by the Eastern lines, and the witness concluded that it would be found, over a longer period, that every train operated by an Eastern line would participate in the transportation of Southern traffic. "The obvious conclusion to be drawn is that Southern traffic shares in the same service provided on traffic generally within Official Territory and is not restricted to any particular trains or categories of service" (V.S. 8, p. 9).

The evidence also shows that the Southern lines basically used the Form A territorial costs and that some 89.45% of the total North-South costs attributed by them to the traffic involved were unadjusted Form A territorial averages (V.S. 40, 40A). That the territorial costs were representative as to the North-South traffic was strongly indicated by that fact.

Again, the record contains comprehensive evidence by Northern lines with respect to each element of cost as to which Southern lines sought to adjust the Form A costs (E.g., V.S. 73, 76, 77 & 80, §§ A-J; Part printed in the Joint Appendix at pp. 609-617, 623-661, see J.S. 3, N. 3).

The evidence also shows that Southern lines have employed Form A territorial average unit costs as appropriate to measure transportation costs of far less scope than that involved in the present case (V.S. 80, Sec. H; J.A. 656-660). Sufficient examples of such use by Southern lines were supplied to illustrate how such territorial costs are used by Southern lines "as a matter of established practice month in and month out before the Commission" (J.A. 656).

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3. Southern lines characterized this evidence as a "train utilization study" (Motion, 11, footnote 11). This evidence was much broader in scope, showing how railroad facilities and services are planned and operated so as to transport all freight in a similar manner irrespective of ultimate point of origin or destination.

With the foregoing evidence before it, and after a detailed consideration of each of the cost adjustments sought by the Southern lines, the expert body concluded that, with the adjustments adopted, the Form A costs were adequate and reasonably accurate and reliable to reflect the costs attributable to the traffic at issue. All of these facts having been before the Commission, it cannot be said that its conclusion lacked support in substantial evidence. The contrary holding of the District Court can only mean that it disagreed with the Commission's appraisal of the significance of these facts. The Commission accepted them as showing that the Form A costs are reliable for use here, as to the traffic involved; the District Court held that greater refinement was necessary. That, however, was not its function.

As to findings, if the adjusted Form A costs used by the Commission are representative of the North-South traffic, as the Commission found, then the higher costs relate to that traffic. These are the costs to the railroads involved of performing their transportation services. They do not pay one scale of wages (their largest item of expense) on North-South traffic and another and different scale on other business. They handle North-South traffic along with all other, an indiscriminate part of the whole. Passenger deficits—here considered upon Southern lines' insistence—are not incurred for any freight traffic, but are spread over all, as part of the constant or overhead expense, for both Northern and Southern lines. The Commission's findings that the costs were reasonably accurate and reliable for determining the cost to the railroads on the traffic involved, plus the 26 pages of cost analysis and conclusions on disputed cost items were all the cost findings that were required of the Commission.

On p. 9 of their Motion, Southern lines say that the lower court was "well aware" that the entire "inflation" in the Northern lines' territorial averages stems from a few services as to which the averages are higher in the North than in the South. Any such "awareness" could derive only from Southern lines' assertions to that effect. The Interstate Commerce Commission made no such finding. Necessarily, the higher Northern costs are the result of the whole complex of conditions under which they operate and the whole complex of conditions under which the Southern lines operate. See *New York v. United States*, *supra*, at pp. 348-349.[4]

Southern lines say (7) that nothing in the decision of the District Court precludes the Commission from relying on Rail Form A as appropriately adjusted, or justifies the concern that the integrity of Rail Form A and other cost formulas is under attack.

In support of this statement, those lines argue that the District Court recognized explicitly that Rail Form A was "devised for the express purpose of measuring territorial average cost and has been widely used as an acceptable means of comparing relative transportation costs" and that it is entitled to full weight when the issue is one "that it is designed to cover." This statement actually shows

4. Southern lines attempt to overcome the important fact that Northern lines' wage levels are higher than theirs by several representations which, upon plenary consideration, Northern lines would show to be inaccurate. It may here be noted that these Appellees state (Footnote, pp. 9 and 10) that Northern lines' higher wages occur in the "executive and professional categories . . ." The evidence shows that they apply in other categories as well (e.g., maintenance of way and structures and maintenance of equipment, V.S. 80, Ex. F-2, pp. 1 and 2, and V.S. 80, F-3, pp. 1 and 2; J.A. 644-8 and 651-2), and also that the "executive and professional" category includes such employees as clerks, stenographers, accountants, elevator operators, patrolmen and watchmen, freight claim agents, janitors, etc. (V.S. 80, Ex. F-2, p. 1; J.A. 646-647).

that the court would severely circumscribe the use of the formula. Upon plenary consideration, Appellants would show that the lower court was mistaken in its conception of the purpose of the formula and in ascribing to it so limited a use.

Moreover under the lower court's decision, it is the reviewing court which would decide whether the formula figures were "appropriately adjusted." Here they were adjusted by the Interstate Commerce Commission and the resulting figures were considered by that body as reliably representing the cost of the North-South traffic. If the District Court can substitute its judgment for that of the Commission and require special studies for greater refinement, the value of the Commission's cost formulas will manifestly be seriously impaired and, moreover, complex questions relating to transportation costs will be decided by the many District Courts which have jurisdiction to review orders of the Commission, rather than by the body which Congress has charged with the administration of the National Transportation Policy and the regulation of carriers subject to its control.

On p. 13 of their motion, the Southern railroads make some comments respecting this case as compared with *Chicago & N.W. R. Co. v. A.T.&S.F. R. Co.*, 387 U.S. 326 (1967). Their purported distinction of that from the instant case is no distinction at all. And it is of the utmost significance that they in no way deny that in that case, as here, although the basis of the Commission's action was the relative costs of the parties reflecting their respective operations as to the traffic involved, the Commission relied almost exclusively upon the Form A average costs of handling all traffic in these territories in reaching its conclusions. No reference whatever is made by the Appellees to that fact or to the statement (quoted in our Jurisdictional

Statement, p. 20) by their co-Appellees, the Southern Governors' Conference, et al., that ". . . there, as here, virtually every objection to reliance upon such territorial averages was brushed aside without either findings or evidence to support such action." In that very recent case this Court held that the evidence, the same kind as is involved in the case at bar, was sufficient to support the inter-territorial divisions order involved. And the Appellees in no way challenge that fact.

II. The remainder of the Motion to Affirm is concerned largely with Southern lines' argument concerning passenger deficits. On the whole, those arguments are clearly met in the Jurisdictional Statement (pp. 25-30). There remains little that warrants comment at this time.

It is argued on p. 16 of the motion that only the deficits attributable to common costs may be assigned to the freight service where the deficit results from commutation operations; yet under the commission's decision the Appellees would have the entire deficit—that resulting from both common and solely related costs—assigned to freight services where the deficit results from intercity passenger service. The Appellees state (16) that the operation of commuter trains requires equipment and facilities which have no relation to freight service, citing, *inter alia,* terminals and yards. But it is just as clear that intercity passenger service requires "equipment and facilities which have no relation at all to freight service." It requires *inter alia,* passenger locomotives, passenger cars, coach yards and passenger terminals. Yet, in the one case (commuter service) the deficit resulting from the expenses pertaining to these "solely related" facilities would be excluded, while in the other case (intercity service) it would remain included. The injustice of adopting this selective approach, which would be so beneficial to Southern lines, is manifest.

In the first paragraph on p. 18 of the motion, it is stated that Commission counsel now argue that because commuter deficits may be taken into account in determining rates, they should also be taken into account in making divisions of those rates, and Appellees go on to state that this theory was not advanced by the railroads in the proceedings before the Commission and that the Northern roads there took the position that a change in divisions is not dependent on a change in rate levels. It was Northern lines' initial position before the Commission that passenger deficits should be completely excluded and only freight costs considered (Jurisdictional Statement, 25), but that if the Commission did consider passenger deficits it should consider all of them and not only those which were of greatest significance to the Southern lines. It is of obvious relevance to the consideration of such deficits in prescribing divisions that they are considered in prescribing rates, and reference to that fact in no way changes the grounds of the Commission's decision. The statement attributed to Northern railroads that a change in divisions is not dependent upon a change in rate levels had nothing to do with the matter of passenger deficits. It related to the entirely different question as to whether a change in class rates must entail a change in divisions, which obviously it need not.

It is stated in the middle paragraph on p. 18 of the motion that rate levels are no higher in the North than in the South and that they have been the same since the *Class Rate* case which was upheld in *New York v. United States,* 331 U.S. 284 (1947). Without saying so, the Southern lines are here referring only to class rates. It is true that the class rates are the same in both territories. These rates move only about 1% of all carload tonnage in the Eastern United States. *Eastern Central Motor Carriers Asso. v.*

B. & O. R. Co., 314 I.C.C. 5, 17 (1961). The rate levels upon which the great volume of the traffic actually moves have become higher in the North than those in the South. *Official-Southern Divisions*, 287 I.C.C. 497, 523 (1953). *Increased Freight Rates, E.W. and S. Territories, 1956*, 300 I.C.C. 633, 689 (1957).

In footnote 15 on p. 19 of their Motion, Appellees quote from *C.&N.W.* to the effect that the issues are different when, in a divisions case, it is argued that carriers in one part of the country should subsidize passenger operations elsewhere. Appellants showed in their Jurisdictional Statement that the consideration given passenger deficits by the Commission had the effect of increasing Southern lines' divisions over what they would have been otherwise, that it was at the insistence of those lines that the Commission included passenger deficits at all, and that the inclusion of passenger deficits may be said to have resulted in Northern lines subsidizing Southern lines. No answer was made to that argument.[5]

5. In Footnote 16 on p. 19, of their Motion, the Appellees assert that this Court recognized that *King v. U.S.*, 344 U.S. 254, had "nothing to do" with the facilities "solely related" to passenger service, and they then quote a single sentence from that decision in support of the assertion. A reading of the case will show that the Court did not limit the Commission's consideration of passenger deficits to those which resulted from common costs. Indeed, it said that if the passenger service cannot bear "its direct costs and its share of the joint costs" the Commission has felt it necessary to take the passenger deficit into account in fixing freight rates; 344 U.S. at 261. The Commission's action in doing so was approved. The Commission's theory with respect to considering passenger deficits in determining freight rates is set forth in detail in *Increased Freight Rates, 1948*, 276 I.C.C. 9, pp. 32-39.

REPLY TO THE MOTION OF APPELLEES, SOUTHERN GOVERNOR'S CONFERENCE, ET AL.

This motion contains so large a number of misleading statements that it cannot be dealt with adequately in a brief which must be prepared with the dispatch now required.

The "Statement" in the Southern Governors' motion (pp. 2-3), while recognizing that the Commission's order in *Class Rate Investigation, 1939, supra,* related only to the "class rate structure", proceeds to state that:

> "Prior to that case, railroad rates had consistently been higher in the South than in the North and Southern shippers had been compelled to pay substantially higher charges to reach Northern markets than Northern shippers were paying to reach Southern markets, even where the distances involved were identical."

That this broad generalization is not even substantially correct will be apparent from the Commission's report in the case cited at pages 593-600, and 601-607. See also the comparisons of the average interterritorial rate levels in 1957, 1958, and 1959 here of record, which show substantially lower rate levels on northbound than on southbound traffic (V.S. 75, p. 3; J.A. 619).

Particularly objectionable is the Southern Governors' erroneous and irresponsible statement at page 4 to the effect that the "Northern interests", having failed to convince this Court that the North was entitled to lower rates because of natural advantages, "refused to accept" the equality with the South upheld in *New York v. United States, supra,* and "decided to pursue their aim of obtain-

ing a preference for the North . . . by seeking inflated divisions from North-South freight traffic . . ."[6]

Since it was only *Northern lines* that sought rehearing in the Commission's proceeding which resulted in the divisions order under review, Southern Governors' indiscriminate use of the term "Northern interests", as to both rate structure and divisions, clearly charges that Northern lines resisted the prescription of uniform class rates, that they refused to accept the equality ordered, and that their effort to secure divisions reflecting relative costs of service was pursuant to a deliberate purpose of "obtaining preference for the North". Nothing could be further from the truth than these charges.

The Northern lines accepted the Commission's decision in the *Class Rate* case. They did not intervene, or otherwise participate, in "the suits by or on behalf of northern and New England States and western railroads to set aside these orders, . . ."[7]

That Appellees should here descend to the level of charging Northern lines—in seeking to obtain divisions reflecting their higher costs—to be motivated by a purpose "to keep the South in a permanent position of economic inferiority", contrary to their statutory duties under the Act, and without a shred of evidence to support such charges, is a cogent commentary on the complete lack of merit in their contentions.

Again, Southern Governors' motion (p. 6) states that "the Commission's orders inflate the Northern railroads' divisions so that they receive, on the average, 17 percent more than the Southern railroads for the same amount and kind of service." The stipulation of the parties embodied in Paragraph 3(4) of the pretrial order states:

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6. An equally offensive and wholly erroneous accusation appears at page 18 of the Motion of Southern railroads.

7. The quoted language is from *New York v. United States*, 331 U.S. at 288.

"Overall, the divisions and revenues of the Southern railroads are reduced approximately 3%. Many divisions of Northern railroads were reduced by the Commission's order." (J.A. 3)

Appellants will endeavor to deal in summary fashion with the principal points set forth in this motion:

1. As to the Need for Findings That Higher Costs Result From Inherent Disadvantages.

Section 15(6) of the Interstate Commerce Act, which empowers the Commission to prescribe divisions and requires that it give due consideration to specified elements along with all other pertinent facts, imposes no such restriction upon the Commission's use of relative costs as these Appellees ask the Court to impose. And no judicial construction of Section 15(6) supports their construction.

The Appellees are incorrect in assuming that the Commission must find that higher costs reflect inherent disadvantages before giving effect to them. The Commission said: "Relying on *New York v. United States,* 331 U.S. 284, 315 (1947), the interveners also take the position that natural disadvantages must be found in the North before we may increase the divisions of the northern railroads." (J.S. 70a) This, of course, was a statement of the Appellees' contention. The Commission answered it by stating, in essence, that other factors being equal, cost differences are the product of, and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories.[8]

8. The Commission then cited *Louisville & N. R. Co. v. Southern Ry. Co.,* 319 I.C.C. 639, at pages 646-47. At the cited pages, the Commission, consistent with its conclusion here, said, after describing contentions concerning operating conditions:

"While an appraisal of the evidence regarding physical operations indicates that both the complainant and the defendant operate in

The factor of special importance here, of course, is efficiency of operation. And the Commission found that both groups of carriers are being operated efficiently and that neither group should be considered as more or less efficient than the other (J.S. 58a).

Moreover, Appellees' reliance on *New York v. United States* on this point is misplaced. There the Court reviewed a decision of the Commission which ordered that class rates over a large part of the country be equalized. The Commission's orders were designed to eliminate regional discriminations in class rates and involved only rate discrimination. Divisions were not in issue. The Commission's authority to reach such regional discrimination was based upon § 3(1) of the Interstate Commerce Act, 49 U.S.C.A. § 3(1), which, *inter alia,* condemns discrimination between regions, districts or territories. There had been a wide disparity in the level of the class rates in the territories involved. The Commission was required by § 3(1) of the act to remove that disparity unless it could find that the differences in class rate levels were justified by transportation conditions pertaining to such rates in the several territories. It is significant that the Commission, in order to determine this fact relied primarily on cost evidence. As the Court noted, at pages 315-316:

> "The Commission found that conditions peculiar to the respective territories did not justify the differences in the territorial class-rate structures. In reach-

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mountainous terrain, there is no need to determine whether such transportation conditions are more favorable or onerous to one than to the other. The nature of the physical transportation circumstances is concededly reflected in the cost of operations. In this respect, the cost data hereinafter discussed form a sounder basis for a determination of the issue raised than any conclusions to be drawn from the numerous factual statements regarding operating conditions."

This decision was affirmed at 380 U.S. 526.

ing that conclusion it first inquired whether the differences in the costs of furnishing the railroad service in the several rate territories justified the existing differences in the levels and patterns of the class rate scales."

Thus, the case of *New York v. United States* actually stands for the proposition that costs are a fair, if not the primary means, of determining differences in territorial conditions. The fact that the Commission and this Court considered cost of service extremely important in determining territorial conditions affecting transportation is further apparent from pages 348-9 of the Court's decision:

> "Revenue needs, like costs of rendering the transportation service, are germane to the question whether differences in territorial rate structures are justified by territorial conditions. They are amongst the standards written into § 15a; they reflect the totality of conditions under which the carriers in the respective territories operate."

The Commission's findings under the heading "Importance to the Public" (J.S. 69a-70a), and its above-quoted finding regarding efficiency of operation were all the findings it was required to make with respect to this contention of these Appellees.

2. That the Commission May Not Impose the Burden of Higher Costs of One Section of the Country on Another, Even if They Result From Inherent Territorial Disadvantages.

On page 9 of their motion, these Appellees infer that the Commission introduced "the wholly unprecedented concept that the railroads of one section of the country should be supported by the people of another section." The Com-

mission did no such thing. Its decision rests on the completely reasonable basis of fixing divisions with relation to relative costs. Divisions, of course, are a matter between railroads, and a change therein does not change the rates paid by shippers. And in paying the rates involved, the shippers are simply paying for services rendered by the railroads, both Northern and Southern. In no sense is there involved a situation in which the railroads of one section are supported or subsidized by the people of another.

No "principal of primary local responsibility" such as these Appellees suggest has governed the prescription of divisions in the North-South cases or otherwise. The authority of the Commission to prescribe disparate divisions of interterritorial rates for the carrier groups concerned, when found by it to be just, reasonable, and equitable, is settled beyond question. *New England Divisions Case,* 261 U.S. 184 (1923), and *Baltimore & O. R. Co. v. United States,* 298 U.S. 349, 370 (1936).

Indeed, in some of the past North-South divisions cases the Commission prescribed divisional factors which, on Florida citrus, were as much as 85% higher, mile for mile, for the Southern lines than for the Northern lines and on traffic in general, 25% higher for Southern than for Northern lines. *Atlantic Coast Line R. Co. v. Arcade & A. R. Corp.,* 194 I.C.C. 729, 761-2 (1933), and *Divisions of Rates, Official and Southern Territories,* 234 I.C.C. 175, 192 (1939). In the first of these cases Commissioner Eastman's dissent pointed out that ". . . the majority are obliged to lean heavily on . . . the fact that while both sets of lines are bad off financially, the southern lines appear to be worse off than the northern." (762) The Commission's order was sustained in *Baltimore & O. R. Co. v. United States,* 298 U.S. 349 (1936). In neither of these instances was the Com-

mission's order regarded as compelling Official territory or its people to subsidize the carriers of the South.

The statement of the lower court in the instant proceeding, which is quoted on p. 37 of these Appellees' Motion, to the effect that the Commission is not perpetually bound by their 1953 holding, which prescribed an equal factor scale, but that the Commission has "special responsibilities in a case of this magnitude when it departs from its prior finding," completely overlooks the change in controlling facts, i.e., that whereas the Commission believed when prescribing equal factors that the costs of both groups of lines were and would remain equal, the evidence in this case shows that those of Northern lines proved to be higher when the record in the present case was made.

That no further findings with respect to this point were required of the Commission is clear. *N.L.R.B. v. Wichita Television Corporation*, 277 F.2d 579, 585; *Minneapolis & St. Louis R. Co. v. U.S.*, 361 U.S. 173, 193-4 (1959).

3. That Uniform Divisions Were Prescribed to Implement the Principle of Uniformity.

At p. 4 of their Motion, Southern Governors state:

> "This equal-factor basis of divisions was prescribed by the Commission itself to implement the principle of uniformity announced in the *Class Rate* case. *Official-Southern Divisions*, 287 I.C.C. 497, 533, 577-578 (1953)."

No reference to this subject appears at the pages cited by Appellees; in fact some of the pages do not even pertain to that case. While the Commission referred to the *Class Rate* scale in deciding upon the contour of the divisional scale prescribed in 1953, its report makes clear that in fixing the level of the divisions as between the Northern and

Southern groups it was guided by all the evidence of record, and particularly the cost evidence. This is made clear by its conclusions on pp. 524-527 of the report, and especially by the statements on p. 526 relating to the Commission's judgment that it considered it to be the safest assumption for the future that neither group would have a lower basis of operating costs than the other and that there are no other relevant circumstances of sufficient importance to justify higher divisional factors for one group than the other. This language clearly indicates that except for the Commission's finding that certain items of expense of Northern lines might be regarded as transient it would have prescribed divisions higher for Northern lines than for Southern on the basis of the cost evidence.

4. That "The Single Most Important Fact About Rail Form A Average Costs Is that These Average Costs Tend to Vary Directly With the Degree of Industrialization in the Areas Served by the Railroads for Which Costs Are Being Computed . . ."

This idea, for which Appellees cite no evidence, and as to which there is none, is basic to a large part of Appellee's argument. The record does show that as the South became more industrialized with relation to the North than it had been in the past, the transportation costs of the Southern railroads became relatively lower than those of the Northern railroads. The relatively greater increase in industrialization in the South in recent years is set forth in the Commission's report under "Economic Trends" (J. S. 50a-52a). The relation of Northern to Southern freight service costs is shown in the table appearing at J.S. 61a. This shows that at 500 miles, for example, the Official Territory costs were 11% higher than the Southern costs in 1948 and 20% higher than Southern costs in 1956 and 1957.

This shows that no reliance can be placed upon the Appellees' dictum that "the greater the degree of industrialization in any area, the higher the Rail Form A average costs of the railroads serving that area." (Motion, p. 10)

5. That the Commission Rejected Southern Lines' Adjustments Largely Because No Other Data Were Available Showing Costs on a Comparable Basis in Both Territories.

This is incorrect. In Footnote 3 on page 15 of the Motion, Appellees refer to what they call "instances" in which Southern railroads' evidence was rejected for lack of "comparable" data for the North, and they refer to empty return ratios, switching, and count of cars. A reference to the Commission's report will show that each of these proposed cost adjustments was rejected by the Commission for reasons independent of the existence or non-existence of comparable data for Northern lines. As to some of the items, the Commission referred to the absence of comparable data. But other reasons for rejecting the proposed adjustments were stated by the Commission in Appendix B to its report.

6. That the Form A Costs Used in Certain Recent Division Cases Were Adjusted.

On page 17 of their Motion to Affirm, these Appellees state that the Commission adjusts Rail Form A average costs in most of the cases in which "a precise determination of costs of service is a vital issue". As examples of such cases, they cite *Louisville & Nashville R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639 (1963) and *Illinois Central R. Co. v. Great Northern R. Co.*, I.C.C. No. 34699 (unreported. Recommended report and order of Oct. 27, 1966 adopted,

with inconsequential changes on July 31, 1967). As to the first of these two divisions cases, they state that the Commission made a substantial adjustment of Rail Form A averages with respect to car costs. This reference to but one adjustment is in contrast with the fact that the Commission made five adjustments in the present case. And the Court will remember that the L&N case dealt with only one commodity moving between limited points on only two railroads, in contrast with the vast scope of the present case. Also in connection with that case, it is interesting to note that while there the Commission adjusted Rail Form A averages with respect to "car costs", in the present case, the Southern lines suggested, as a substitute for the Form A car costs of the Northern and Southern railroads, the car costs of all the railroads in the United States, on all the traffic of the country (J.S. 114a).

The second case, *Illinois Central v. Great Northern,* also involved a single commodity moving between points on only two railroads and the adjustment cited by the Appellees was again only one, "to give effect to the fact that the traffic at issue required 'less than average engine minutes per car in origin and destination switching' ". In the present case, the Commission found that "territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories." It also found that the special switching studies in the South "have weaknesses, both in the sample and in the studies themselves" (J.S. 140a).

7. That the Chicago & North Western Case Was One in Which the Court Found Independent Evidence in the Record Supporting the Applicability of the Rail Form A Averages to the Traffic at Issue.

This statement (on page 22 of the Motion) should be contrasted with the statement by these same Intervenors in their brief as *amici curiae* in *Chicago & North Western,* which is quoted in Appellants' Jurisdictional Statement at pages 19-20.

8. That the Northern Railroads Suffer From Overcapacity to a Greater Extent Than the Southern Railroads.

This statement (e.g., on p. 29 of their Motion) has no support in the evidence whatever. The claims of Northern lines' alleged overcapacity are founded primarily upon generalizations concerning merger activity in the North. However, there is like merger activity in the South. The Commission has approved the mergers of the Central of Georgia and the Southern Railway, and of the Seaboard Airline and the Atlantic Coast Line, the latter, of course, being already in control of the Louisville & Nashville. A proposal for the merger of the Illinois Central and the Gulf, Mobile & Ohio is now going forward.

The Commission stated (J.S. 58a) that "... the southern lines themselves have noted that mergers are now going forward in all territories, including the South. If and when such proposed mergers are ultimately approved and finally consummated in both groups the savings produced thereby will be then reflected in the respective unit costs. The economies hoped to be effected thereby and the savings expected are not ascertainable for future operation to the degree required for any specific adjustment here of the cost studies of record."

9. That the Commission's Orders Would Nullify the Gains Realized by the South and Cause Rate Increases Within the South.

The suggestion that the Commission's decision in the present case would result either in a substantial diminution in the quality of rail service within the South or a "substantial increase in rates", and all the speculative consequences thereof which are alleged in the Motion, are hollow in the extreme. The Commission's estimate of the amount of the revenue reduction to the Southern lines as a result of the order here under review ($7,948,000.00, J.S. 99a) is only 62/100 of 1% of the freight revenue of the Southern lines ($1,280,900,000.00, J.A. 516) for the year in which the Commission's calculations were made (1956). After an appropriate adjustment for income taxes, therefore, it would appear that the reduced revenue might be somewhere in the neighborhood of 4/10 of 1% of the gross freight revenue of Southern lines. It is difficult to understand, therefore, how Appellees could be envisaging "a substantial increase in rates" as a consequence of this divisions order. The Commission considered these Appellees' contentions and found that the prescribed divisions "can result in no unlawful injury to the South" (265 I.C.C. at 27-28; 69a-70a).

IN THE EVENT OF REMAND THE PRESCRIBED DIVISIONS SHOULD BE PERMITTED TO CONTINUE IN EFFECT SUBJECT TO READJUSTMENT AS NECESSARY TO PROTECT ALL PARTIES.

In footnote 20 at page 22 of their motion to affirm, the Southern lines suggest that Northern lines, not having specifically asked the Court below to retain jurisdiction to require equitable resettlements in the event of a further order of the Commission upon remand, should for that

reason be denied that relief here. As an offset to the revenue losses Northern lines would thereby suffer from an unprotected remand, Southern lines suggest that under the pre-existing equal-factor divisions the Northern lines would still have the benefit of a terminal factor "which the Commission found to be excessive in the amount of $7,426,000 annually . . ." But this conclusion assumes the correctness of Southern lines' contention that the Commission upon rehearing separately found that the divisional scale it prescribed in 1953 "was invalid because of an excessive terminal element of 37 integers in the initial mileage block", a contention which the Court below specifically rejected (5a-6a).[9]

It is entirely possible that if the Commission should be required to give further consideration to this matter, such further consideration would result in the prescription for Northern lines of similar or substantially similar divisions to those here involved. But the Commission would lack authority under Section 15(6) to make a new divisions order retroactive so as to protect Northern lines for the large revenue losses they would suffer for the period from April 20, 1965, until a new order could become effective for the future following the remand proceeding.

It is respectfully submitted that this Court, in the event of remand to the Commission for further findings, should, therefore, employ the procedure it adopted in *Sec'y of Agriculture v. United States,* 347 U.S. 645 (1954), in which it vacated the District Court's order and remanded the cause to the Commission for more explicit findings, but without invalidating the Commission's order or enjoining its enforcement, thus leaving the unloading charges fixed

9. At page 34, Southern Governors' Motion suggests that the higher wages and taxes in the North are offset by its greater traffic density. But this assumption is not soundly based. *Divisions of Freight Rates,* 148 I.C.C. 457, 473.

by the Commission's order in effect pending completion of the remand proceedings. Such a procedure here would protect the interests of all parties by assuring the application of such divisions as the Commission might ultimately prescribe to all traffic moving subsequent to April 20, 1965.

CONCLUSION.

The Commission's decision of February 3, 1965 was the culmination of almost six years of an administrative process designed to assure equitable divisions for both the Northern and Southern lines. Appellees would have these six years of labor which the parties and the Commission devoted to this case nullified without full consideration by this Court, by the affirmance of a decision, the central fact of which is that the lower court substituted its judgment for that of the Commission on the complex administrative question of transportation costs. The authority of a court to decide such questions has been repeatedly denied by this Court, and as recently as in 1967 in *Chicago & N.W. R. Co., supra.*

The importance of this case to Northern lines cannot be overstressed. The affirmance sought would force them to begin all over again with administrative proceedings that would doubtless consume additional years, with no opportunity to preserve the increases awarded them in 1965. It would require the payment by them of over $25 million to the Southern lines and the loss of some $8 million annually until the issuance of a new order by the Commission. In view of these facts and of the important questions presented in the Jurisdictional Statements, it is respectfully submitted that the summary affirmance sought by the Appellees should be denied and the case set down for plenary consideration by this Court.

Respectfully submitted,

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